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December 16, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

*Re: EB Docket No. 11-71
File No. EB-09-IH-1751
Application File Nos. 0004193328 et al.*

Dear Secretary Dortch:

Please find enclosed for filing the in above-referenced proceedings an original and six (6) copies of the Brief of Duquesne Light Company in Support of Joint Motion for Summary Decision on Issue G. Enclosed please also find a duplicate original. Kindly date-stamp the duplicate original upon receipt, and return it to the courier.

Please do not hesitate to contact the undersigned at (202) 659-6669 if you have any questions.

Respectfully submitted,

Brett Heather Freedson

Counsel to Duquesne Light Company

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 11-71
)	
MARITIME COMMUNICATIONS/LAND	)	File No. EB-09-IH-1751
MOBILE, LLC	)	FRN: 0013587779
)	
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
)	
Applicant for Modifications of Various	)	Application File Nos.
Authorizations in the Wireless Radio Services	)	0004030479, 0004144435,
	)	0004193028, 0004193328,
Applicant with ENCANA OIL AND GAS (USA),	)	0004354053, 0004309872,
INC.; DUQUESNE LIGHT COMPANY; DCP	)	0004310060, 0004314903,
MIDSTREAM, LP; JACKSON COUNTY	)	0004315013, 0004430505,
RURAL MEMBERSHIP ELECTRIC	)	0004417199, 0004419431,
COOPERATIVE; PUGET SOUND ENERGY,	)	0004422320, 0004422329,
INC.; ENBRIDGE ENERGY COMPANY,	)	0004507921, 0004153701,
INC.; INTERSTATE POWER AND LIGHT	)	0004526264, and 0004604962
COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE-MID CONTINENT, LLC;)	
AND SOUTHERN CALIFORNIA REGIONAL)	
RAIL AUTHORITY)	
)	
For Commission Consent to Assignment of Various)	
Authorizations in the Wireless Radio Services)	

**BRIEF OF DUQUESNE LIGHT COMPANY IN SUPPORT OF
JOINT MOTION FOR SUMMARY DECISION ON ISSUE G**

Duquesne Light Company ("Duquesne"), by its undersigned counsel, submits this brief in support of the Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G,¹ and concurs in the moving parties' request that the Presiding Judge issue an order concluding that call sign WHG750 was constructed and operated in accordance with the Commission's rules.

¹ Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G, filed Dec. 2, 2013 ("Joint Motion").

Duquesne submits that the order requested in the Joint Motion would further the public interest in enabling Duquesne to continue operating mission-critical wireless spectrum that is essential both to its internal communications systems, and its smart metering network.

I. BACKGROUND

Duquesne is an investor-owned electric utility serving approximately 584,000 residents, businesses, government institutions, and hospitals throughout Allegheny and Beaver Counties, in southwestern Pennsylvania, including in the City of Pittsburgh.² Duquesne's business mission is delivering safe and reliable electric power service to its customers through its extensive network of 45,000 miles of overhead power lines, 250,000 distribution poles, and 103,000 transformers.³ The operations of Duquesne are at all times supported by, and dependent on the functions of its complex radio communications system, including: voice communications between and amongst Duquesne's fixed and mobile storm recovery units, and other utilities, municipalities, police and fire departments, and first responders; internal data communications; and supervisory control and data acquisition (SCADA).⁴ Since early 2010, Duquesne has been making pronounced efforts to enhance its wireless communications capabilities, in particular, within certain rural portions of its service area where old copper lines are not well integrated into its communications network.⁵

In addition to serving Duquesne's internal communications needs, wireless spectrum also is an essential component of the smart metering system constructed by Duquesne, pursuant to the 2008 mandate of the Commonwealth of Pennsylvania.⁶ For the stated purpose of reducing energy

² <https://www.duquesnelight.com/insideDuquesneLight/AboutUs/ServiceAreaMap.cfm>.

³ *Id.*

⁴ See Petition for Reconsideration, Request for Removal from Hearing Designation Order, and Request for Grant of Application of Duquesne Light Company ("Duquesne Petition") at 2; Declaration of Mark Sprock, appended thereto, at ¶ 2-3 ("Sprock Declaration"), filed May 19, 2011.

⁵ Sprock Declaration at ¶ 6.

⁶ Duquesne Petition at 3; Sprock Declaration at ¶ 10.

consumption and demand, Pennsylvania House Bill 2200, commonly known as Act 129 of 2008, required all electric distribution companies having greater than 10,000 customers to submit to the Pennsylvania Public Utility Commission (PAPUC) for approval a smart meter procurement and installation plan, including a full schedule for deployment, and statement of total implementation costs.⁷ The plan submitted to the PAPUC by Duquesne in accordance with Act 129 contemplated Duquesne's use of wireless frequencies at or near 220 MHz, including those frequencies leased from Maritime since 2010,⁸ and subject to an Asset Purchase Agreement between Duquesne and Maritime now pending Commission approval.⁹ Upon obtaining the required authorization of the Commission, in 2010, Duquesne constructed, and placed into operation antenna structures at ten (10) sites covered by call sign WHG750,¹⁰ and Duquesne continues its operations at each of these antenna structure sites to date.¹¹

On April 21, 2010, Duquesne and Maritime jointly filed with the Commission a complete Application for Assignment of Authorization, seeking disaggregation of call sign WHG750, in the Automated Maritime Telecommunications Service (AMTS), and assignment of certain sub-bands from Maritime to Duquesne.¹² The Application states that the spectrum subject to assignment is an essential part of Duquesne's planned capital improvement of facilities within deeply rural portions

⁷ Duquesne Petition at 3.

⁸ Duquesne currently leases from Maritime wireless spectrum in the 217-219 MHz bands, licensed to Maritime under call sign WHG750. After testing WiMax, licensed 900 MHz spectrum, and unlicensed spread-spectrum bands, Duquesne determined frequencies within at or near 220 MHz would be best suited for Duquesne's smart metering platform, in terms of range, coverage over the unique, mountainous terrain within Duquesne's rural southwestern Pennsylvania service area, cost, and availability of equipment.

⁹ FCC File No. 0004193328, Asset Purchase Agreement, dated Feb. 18, 2010 (subject to request for confidential treatment).

¹⁰ Duquesne's Answers to Enforcement Bureau's First Set of Interrogatories, filed Aug. 27, 2012, Duquesne's First Amended Response to Enforcement Bureau's First Set of Interrogatories, filed Sept. 6, 2012, Nos. 1, 3, 4, 5, 6, and 9.

¹¹ *Id.* Duquesne averred, however, that because it required greater certainty in its long term operations in light of this ongoing proceeding, 217-219 MHz antennas at three (3) of the sites covered by the frequencies leased from Maritime were replaced by 900 MHz antennas in 2012.

¹² FCC File No. 0004193328. For a complete list of sub-bands, or for a further explanation of the disaggregation sought, *see* Application, "Explanation of Application," attached thereto.

of its service area, intended to protect Duquesne's personnel, and property of inestimable value.¹³ The Presiding Judge's grant of the relief requested in the Joint Motion would enable the Wireless Telecommunications Bureau to process the Application, and in turn, would authorize Maritime and Duquesne to consummate an asset transaction resulting in Duquesne's rightful ownership of those frequencies which Duquesne has operated, pursuant to its lease from Maritime, for nearly four (4) years. Furthermore, the proceeds from the partial sale of call sign WHG750 to Duquesne would be distributed among the creditors of Maritime, as ordered by the United States Bankruptcy Court for the Northern District of Mississippi.¹⁴

II. THE ENFORCEMENT BUREAU IS SATISFIED THAT CALL SIGN WHG750 HAS BEEN CONSTRUCTED AND OPERATED IN ACCORDANCE WITH THE COMMISSION'S RULES.

The Commission's Order commencing this proceeding concluded that a disputed issue of material fact exists as to whether site-based AMTS licenses granted to Maritime, including call sign WHG750, were at any time subject to automatic termination, pursuant to the Commission's rules.¹⁵ Therefore, the Commission designated for hearing the specific questions of: (1) whether Maritime's site-based AMTS licenses were constructed in accordance with Sections 1.955(a) and 80.49(a) of the Commission's rules; and (2) whether operations pursuant to those licenses were ever "permanently discontinued."¹⁶ On the basis of the undisputed facts submitted by Maritime and other parties to this proceeding, the Enforcement Bureau has concurred with Maritime that no violation of the Commission's rules resulted in automatic termination of the site-based AMTS licenses granted to Maritime, and accordingly, summary disposition of Issue G is appropriate as to the sixteen (16) AMTS licenses that remain under review, including call sign WHG750.

¹³ See FCC File No. 0004193328; see Application, "Public Interest Statement", attached thereto.

¹⁴ See *In re: Maritime Communications/Land Mobile, LLC*, Debtor, Case No. 11-13463-DWH (N.D. Miss.).

¹⁵ Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520, FCC 11-64 at ¶ 61 (rel. Apr. 19, 2011).

¹⁶ *Id.* at ¶ 62(g) ("Issue G").

The Joint Motion demonstrates that call sign WHG750 was not constructed or operated at variance with either of Section 1.955(a) or Section 80.49(a) of the Commission's rules. Maritime previously moved, and the Enforcement Bureau agreed that Issue G is determined, in part, by the Commission's 1987 Memorandum Opinion and Order dismissing challenges to the qualifications of the licensee, and concluding that call sign WHG750 was timely constructed.¹⁷ Responding to the Presiding Judge's most recent Memorandum Opinion and Order,¹⁸ the Enforcement Bureau and Maritime now also have demonstrated that Maritime's actions since becoming the licensee of call sign WHG750 are most consistent with Commission precedent wherein discontinuance of service was not deemed to be "permanent," under Section 1.955(a) of the Commission's rules.¹⁹

Because the service rules governing Maritime's site-based AMTS licenses do not define "permanent discontinuance," the Commission evaluates claims arising under Section 1.955(a)(3) on a case-by-case basis.²⁰ In *Northeast Utilities Service Co.*, the Wireless Telecommunications Bureau concluded that "permanent discontinuance" of service had not occurred where the subject AMTS licensee exercised due diligence in its efforts to resume service following the destruction of its licensed site.²¹ The Joint Motion establishes that Maritime, similarly, acted with the clear intention of restoring operations pursuant to its licenses, in: maintaining equipment and electrical power at those licensed sites where service was discontinued; engaging consultants and spectrum

¹⁷ *In the Matter of Applications of Waterway Communications System, Inc. for Renewal of Automated Maritime Telecommunications System Station Licenses WHG700-WHG703 and WHG705-WHG754*, File Nos. 855083-855136, 2 FCC Rcd 7317, FCC 87-373 (rel. Dec. 10, 1987) at ¶ 16 ("Watercom was required to meet a schedule of construction, regularly kept us apprised of the status of construction, and put the system into operation within the time we allowed. So there can be no question of spectrum hoarding or other dereliction in its inauguration of service."). See also Joint Motion at ¶ 14; Memorandum Opinion and Order, FCC 13M-016 at ¶ 14 (rel. Aug. 14, 2013) (acknowledging that "[t]he Bureau agreed that this order resolves the construction question of Issue (g) with respect to the Watercom Licenses, and in that respect, there is no genuine issue of material fact for determination at the hearing.") (internal quotations omitted).

¹⁸ Memorandum Opinion and Order, FCC 13M-016 at ¶ 14 (rel. Aug. 14, 2013)

¹⁹ See Joint Motion at ¶ 19.

²⁰ See 47 C.F.R. Part 80.

²¹ *In the Matter of Applications of Northeast Utilities Service Co. to Modify License for Station WQEJ718*, File No. 0003026497, Order, DA 09-643, 24 FCC Rcd 3310 (rel. Mar. 20, 2009) at ¶¶ 9-10.

brokers to actively pursue new opportunities for use of the licensed spectrum; and entering into multiple lease arrangements with third parties, including Duquesne.²² Furthermore, the facts set forth herein demonstrate that the sub-bands of call sign WHG750 leased to Duquesne have been operating since 2010, and have served as an essential component of Duquesne's smart metering system, and internal communications network.²³

Pursuant to the FCC's rules, summary decision is appropriate where, as here, there is no genuine issue of material fact for determination at the hearing.²⁴ The Joint Motion sets forth the undisputed facts and Commission precedent supporting that summary disposition of Issue G is appropriate. The parties opposing the Joint Motion have not, however, identified any established fact on the record in this proceeding that remains disputed. Indeed, although the oppositions to the Joint Motion recently filed disavow certain facts of record cited therein, those oppositions are based merely on argument and opinion, and not on contrary evidence.

III. THE DISPOSITION OF ISSUE G WOULD SERVE THE PUBLIC INTEREST.

The Presiding Judge's disposition of Issue G is a precondition to Duquesne and Maritime obtaining the Commission's approval of an assignment granting Duquesne rightful ownership of AMTS stations that now have become fully integrated into its internal communications network and smart metering system. Duquesne has invested considerable resources into operating leased sub-bands of call sign WHG750, for the purpose of developing infrastructure that promotes safe and reliable electric power service, and complies with state-sanctioned smart metering mandates intended to facilitate efficient energy consumption. If the pending Application for assignment of WHG750 is not granted in the near future, the resulting uncertainty could soon force Duquesne

²² Joint Motion at ¶ 27.

²³ See also Joint Motion at ¶ 28.

²⁴ 47 C.F.R. § 1.251(a)(1).

to implement replacement or redundant spectrum technologies, thus rendering the advancements of this past four (4) years meaningless.²⁵

IV. CONCLUSION

For the reasons set forth herein, and in the Joint Motion of the Enforcement Bureau and Maritime, Duquesne respectfully requests that the Presiding Judge issue an order concluding that call sign WHG750 was constructed and operated in accordance with the Commission's rules, and disposing of Issue G forthwith.

Respectfully submitted,



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DATED: December 16, 2013

²⁵ Lack of certainty as to the disposition of call sign WHG750 caused Duquesne to replace 217-219 MHz antennas with 900 MHz antennas at three (3) sites. See Duquesne's Answers to Enforcement Bureau's First Set of Interrogatories, filed Aug. 27, 2012, Duquesne's First Amended Response to Enforcement Bureau's First Set of Interrogatories, filed Sept. 6, 2012, No. 9.

CERTIFICATE OF SERVICE

I, Brett H. Freedson, certify that on this 16th day of December, 2013, I caused a true and correct copy of the foregoing Brief of Duquesne Light Company in Support of Joint Motion for Summary Decision on Issue G to be served via electronic mail and first-class mail, postage prepaid, upon:

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